

No. 12415

United States
Court of Appeals
For the Ninth Circuit.

CHIN CHIU FONG and CHIN CHIU CHUNG,
Appellants,

vs.

ARTHUR J. PHELAN, Acting District Director
of the Immigration and Naturalization Service,
San Francisco District,
Appellee.

Transcript of Record

Appeal from the United States District Court
Northern District of California,
Southern Division.

FILED
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PAUL P. O'BRIEN,
Clerk

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

MR. JOSEPH S. HERTOGS,

Attorney for Petitioners and Appellants,
580 Washington Street,
San Francisco, California.

MR. FRANK J. HENNESSY,

United States Attorney,
Northern District of California,
Post Office Building,
San Francisco, California.

On appeal from the United States District Court
for the Northern District of California, South-
ern Division.

Decision of Judge Michael J. Roche.

In the Southern Division of the United States
District Court for the Northern District of
California

Habeas Corpus No. 29099R

In the Matter of the Applications of
CHIN CHIU FONG and CHIN CHIU CHUNG
for a Writ of Habeas Corpus.

PETITION FOR WRIT OF HABEAS CORPUS

The petition of Joseph S. Hertogs on behalf of
the Chin Chiu Fong and Chin Chiu Chung respect-
fully shows:

I.

That the said Chin Chiu Fong and Chin Chiu
Chung, the persons in whose behalf this writ is ap-
plied for, are now detained and restrained of their
liberty by the respondent, Arthur J. Phelan, as the
Acting District Director of the Immigration and
Naturalization Service, San Francisco District, and
his officers and agents; that the said Chin Chiu
Fong and Chin Chiu Chung are now confined in the
Detention Facilities of the Immigration and Natu-
ralization Service at 630 Sansome Street, City and
County of San Francisco, State of California;

II.

That no one has filed, in behalf of the said Chin
Chiu Fong and Chin Chiu Chung, a previous appli-
cation for a writ of Habeas Corpus in and about
the matter set forth herein to any court;

III.

That the petitioner has been advised by the San Francisco Office of the Immigration and Naturalization Service that the said Chin Chiu Fong and Chin Chiu Chung are to be deported from the United States on August 25, 1949; that such deportation would deprive the said Chin Chiu Fong and Chin Chiu Chung of residence in the country of their claimed citizenship; that such deportation will take effect unless this Court intervened to prevent such deportation;

IV..

That the said Chin Chiu Fong and Chin Chiu Chung arrived at the port of San Francisco, State of California, ex China National Aviation Corporation Plane XT 101 on December 15, 1948; that they seek admission as United States citizens such citizenship having been acquired under the provision of Section 1993 United States Revised Statutes; that their father, Chin Yow Kim, was born at New York, New York, on June 18, 1911; that the United States citizenship of Chin Yow Kim is conceded by the Immigration and Naturalization Service;

V.

That subsequent to their arrival Chin Chiu Fong and Chin Chiu Chung were detained for further examination before a Board of Special Inquiry; that thereafter on February 23, 1949, the Board of Special Inquiry voted to exclude the applications

from admission to the United States; that the excluding decision of the Board of Special Inquiry has been affirmed on appeal by both the Acting Assistant Commissioner of Immigration and Naturalization and the Board of Immigration Appeals;

VI.

That the said Chin Chiu Fong and Chin Chiu Chung were denied, during the Board of Special Inquiry hearing, the right to have a friend or relative present; that the Board of Special Inquiry failed to properly inform the said Chin Chiu Fong and Chin Chiu Chung of this right as required by 8 C.F.R. 130.2;

VII.

That the said Chin Chiu Fong and Chin Chiu Chung were denied a fair and impartial hearing by the Board of Special Inquiry; that the Board of Special Inquiry acted in an unlawful and improper way; that the Board had a biased preconceived opinion before hearing all of the evidence; that such allegation is not based upon any one statement but upon the entire record; that due to the lack of a reasonable time a copy of the record is not annexed;

VIII.

That the excluding decision, insofar as it relates to the applicant, Chin Chiu Fong, is not supported by the evidence; that the Board of Special Inquiry, during the examination of Chin Chiu Fong, stated:

Q. You are advised that the testimony given by Lee Ngook Hong on January 28, 1949, very nearly agrees with the testimony given by you before this Board. Do you have any comment to make?

A. I have no comment. I was just telling the truth.

that the said Lee Ngook Hong is the alleged mother of the applicants, Chin Chiu Fong and Chin Chiu Chung; that the said Lee Ngook Hong entered the United States for permanent residence about one year ago;

IX.

That the said Arthur J. Phelan and his officers and agents as aforesaid threaten to transport the bodies of the said Chin Chiu Fong and Chin Chiu Chung beyond the jurisdiction of this Court to the country of Hongkong; that the said Chin Chiu Fong and Chin Chiu Chung are minors, natives of Hongkong, and of the Chinese race; that they have resided, except for a few months, in China; that China is now engaged in civil war that would endanger the lives of the said Chin Chiu Fong and Chin Chiu Chung; that to deport the said Chin Chiu Fong and Chin Chiu Chung to Hongkong or China would be unusual and inhuman punishment, contrary to the dictates of humanity;

X.

That said detention and restraint are illegal, and their illegality consists in the following, among other things, to wit:

(a) The applicants, Chin Chiu Fong and Chin Chiu Chung, have been denied the rights guaranteed to them by "due process of law" clause of U.S.C.A. Constitutional Amendment 5.

(b) That such deportation would be in conflict with the policy, practice and rule of the Attorney General not to deport a person to a country or territory under enemy domination.

/s/ JOSEPH S. HERTOGS,
Attorney for Petitioners.

State of California,
City and County of San Francisco—ss.

Joseph S. Hertogs, being first duly sworn, on behalf of the petitioners in the above entitled proceeding, says:

That he has read the foregoing petition, and knows the contents thereof, and that the facts therein alleged are within his knowledge and that the same is true, except as to the matters therein stated upon information or believe, and as to those matters that he believes it to be true; that affiant is petitioners' attorney and that petitioners cannot read English proficiently and are detained in the

custody of respondent and, therefore, are unable to verify said petition and that affiant, therefore, makes this affidavit.

/s/ JOSEPH S. HERTOGS, ,

Affiant.

Subscribed and sworn to before me this 25th day of August, 1949.

[Seal] /s/ L. RUTH WILBUR,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires February 8, 1955.

[Endorsed]: Filed August 25, 1949.

In the Southern Division of the United States
District Court for the Northern District of
California

Habeas Corpus No. 29099R

CHIN CHIU FONG and CHIN CHIU CHUNG,
Petitioners,

vs.

ARTHUR J. PHELAN,

Respondent.

WRIT OF HABEAS CORPUS

To: Arthur J. Phelan, Acting District Director,
Immigration and Naturalization Service, United
States Department of Justice, 630 Sansome
Street, San Francisco, California.

Greeting:

You Are Hereby Commanded that the bodies of

Chin Chiu Fong and Chin Chiu Chung by you restrained of their liberty, as it is said detained by whatsoever names the said Chin Chiu Fong and Chin Chiu Chung may be detained, together with the day and cause of their being taken and detained, you have before the Honorable Michael J. Roche, Judge of the United States District Court in and for the Northern District of California, Southern Division, at the court room of said court, in the City and County of San Francisco at 9:30 o'clock a.m., on the 12th day of September, 1949, then and there to do, submit to and receive whatsoever the said Judge shall then and there consider in that behalf; and have you then and there this writ.

Witness, the Honorable Michael J. Roche, United States District Judge at San Francisco, California, this 25th day of August, 1949.

/s/ MICHAEL J. ROCHE.

[Endorsed]: Filed August 25, 1949.

[Title of District Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE

Comes now Arthur J. Phelan, Acting District Director of the Immigration and Naturalization Service, port of San Francisco, California, and for cause why a Writ of Habeas Corpus should not issue herein shows:

I.

That the persons in whose behalf the Order to Show Cause was issued (hereinafter termed the

“applicants”) arrived at the port of San Francisco, California, on December 15, 1948 and applied for admission to the United States.

II.

That the applicants herein were held for examination by a Board of Special Inquiry with relation to their right to enter the United States; that thereafter and on February 17, 1949, the said applicants were refused admission to the United States by said Board of Special Inquiry on the grounds that they and each of them were in fact aliens not in possession of proper documents which would entitle them to admission to the United States.

III.

That on appeal to the Commissioner, Immigration and Naturalization Service, Washington, D. C., the excluding decision was affirmed on April 26, 1949. A further appeal to the Board of Immigration Appeals was dismissed on July 20, 1949.

IV.

That the Board of Special Inquiry was duly appointed under the provisions of Sec. 17 of the Immigration Act of 1917, 39 Stat. 887, 8 U.S.C.A. 153.

V.

That the original record of the entire proceedings before the Immigration and Naturalization Service pertaining to these applicants is affixed hereto and

made a part hereof as respondents' Exhibits A, B, and C.

Wherefore, respondent prays that the Order to Show Cause be dismissed and that the Petition for Writ of Habeas Corpus be denied.

/s/ ARTHUR J. PHELAN,
Acting District Director, Immigration and Naturalization Service, Port of San Francisco, California.

[Endorsed]: Filed September 19, 1949.

[Title of District Court and Cause.]

ORDER DENYING PETITION

The above-named applicants, Chin Chiu Fong and Chin Chiu Chung, seek admission into the United States as United States citizens, alleging acquirement of United States citizenship at birth under the provisions of Sec. 1993 Rev. Stat., as the children of a United States citizen father who has previously resided in the United States. The alleged father is a citizen by birth and his wife, the alleged mother, has already been admitted to the United States, pursuant to the provisions of 8 U.S.C. 232. The applicants were examined by a Board of Special Inquiry at San Francisco and the testimony of the alleged parents and another witness was taken in New York. The Board refused the applicants ad-

mission on the ground that they had failed to prove their alleged blood-relationship and were in fact aliens not in possession of proper documents which would entitle them to admission into the United States. The exclusion order was affirmed on appeal and a further appeal to the Board of Immigration Appeals was dismissed. The conclusion of the Board of Special Inquiry was based on certain marked discrepancies in the testimony of the applicants and the alleged mother. This petition for writ of habeas corpus followed.

It is well settled that the exclusion order of a Board of Special Inquiry is final unless the record discloses an abuse of discretion, an unfair hearing or error of law. *Vajtauer v. Commissioner*, 273 U.S. 103. It appears from the record in this case that the applicants were given a fair hearing and that the Board's findings are supported by evidence of probative value. It is therefore by the Court

Ordered that the petition for writ of habeas corpus be and the same is hereby Denied and that the order to show cause heretofore issued be and the same is hereby Discharged.

Dated: October 21st, 1949.

/s/ MICHAEL J. ROCHE,
U. S. District Judge.

[Endorsed]: Filed October 21, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: The Clerk of the Above-Entitled Court and to Defendant and to Frank J. Hennessy and Edgar R. Bonsall, his attorneys:

Take notice that the plaintiffs in the above-entitled action hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment therein rendered and entered in the said Southern Division of the United States District Court for the Northern District of California on the 21st day of October, 1949, in favor of the defendant and against said plaintiffs.

Dated this 27th day of October, 1949.

/s/ JOSEPH S. HERTOGS.

[Endorsed]: Filed October 27, 1949.

[Title of District Court and Cause.]

ORDER

It appearing to the court that the plaintiffs, Chin Chiu Fong and Chin Chiu Chung, by their attorney, Joseph S. Hertogs, have this day filed a notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of the Southern Division of the United States District Court for the Northern District of California en-

tered on the 21st day of October, 1949, in favor of the defendant and against said plaintiffs; that the said plaintiffs' attorney has been advised this date that the plaintiffs are to be deported from the United States this date; and that such appeal would be useless unless the plaintiffs are permitted to remain within the jurisdiction of this court pending determination of their appeal.

It Is Ordered that the said plaintiffs shall not be removed from the jurisdiction of this court pending final disposition of their appeal.

Dated this 27th day of October, 1949.

/s/ MICHAEL J. ROCHE.

Approved 10-27-49.

/s/ EDGAR R. BONSALE,
Asst. U. S. Attorney.

[Endorsed]: Filed October 27, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents and Exhibits listed below, are the originals filed in this Court, in the above-entitled case,

and that they constitute the Record on Appeal herein, as designated by the Appellant, to wit:

Petition for Writ of Habeas Corpus

Writ of Habeas Corpus

Return to Order to Show Cause

Order Denying Petition and Discharging Order to Show Cause

Notice of Appeal

Order that Petitioners Remain in Jurisdiction of Court

Designation of Contents of Record on Appeal

Exhibits A, B, and C.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 3rd day of December, A.D. 1949.

C. W. CALBREATH,
Clerk,

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12415. United States Court of Appeals for the Ninth Circuit. Chin Chiu Fong and Chin Chiu Chung, Appellants, vs. Arthur J. Phelan, Acting District Director of the Immigration and Naturalization Service, San Francisco District, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed December 5, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12415

CHIN CHIU FONG and CHIN CHIU CHUNG,
Petitioners-Appellants,
vs.

ARTHUR J. PHELAN,
Respondent-Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY IN THE
APPEAL OF THE ABOVE - ENTITLED
MATTER

Comes now Chin Chiu Fong and Chin Chiu Chung, by and through their attorney, Joseph S. Hertogs, files herein the Statement of Points on which Appellants intend to rely in the appeal of the above-entitled matter:

I.

The District Court erred in holding that the appellants were given a fair hearing as required by the "due process of law" clause of the Fifth Amendment to the Constitution of the United States.

II.

That the District Court erred in holding and deciding that the Appellee complied with Section 153,

Title 8, United States Code Annotated (Act of February 5, 1917; 39 Stat. 887).

III.

That the District Court erred in holding and deciding that the Appellee complied with Part 130.2 of Title 8, Code of Federal Regulations (Published 11 F. R. 14232, December 11, 1946).

IV.

That the District Court erred in not remanding the case to the Appellee for a hearing de novo.

/s/ JOSEPH S. HERTOGS,
Attorney for Appellants.

Receipt of copy acknowledged.

[Endorsed]: Filed December 13, 1949.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD TO BE INCORPORATED IN TRANSCRIPT ON APPEAL

Chin Chiu Fong and Chin Chiu Chung, appellants, in the above-entitled matter, by and through their attorney, Joseph S. Hertogs, (in accordance with Rule 75 (a) of the Federal Rules of Civil Procedure) hereby designate the following to be included in the Transcript on Appeal on their pending appeal from the judgment made, filed and entered in said matter October 27, 1949:

1. Petition for Writ of Habeas Corpus filed on behalf of Chin Chiu Fong and Chin Chiu Chung.
2. Order that petitioners remain within jurisdiction of court.
3. Writ of Habeas Corpus.
4. Return to order to Show Cause filed by Arthur J. Phelan, Acting District Director, Immigration and Naturalization Service, San Francisco, California.
5. Order denying petition for Writ of Habeas Corpus.
6. Notice of Appeal.
7. Stipulation and Order that exhibits be considered in original form without printing.

/s/ JOSEPH S. HERTOGS,
Attorney for Appellants.

Receipt of copy acknowledged.

[Endorsed]: Filed December 13, 1949.

[Title of Court of Appeals and Cause.]

STIPULATION AND ORDER

It Is Hereby Stipulated by and between counsel for appellants and counsel for appellee that the exhibits listed in the "Designation of Record on Appeal" may be considered in their original form without printing.

/s/ JOSEPH S. HERTOGS,
Attorney for Appellants.

/s/ FRANK J. HENNESSY,
U. S. Attorney.

/s/ EDGAR R. BONSTALL,
Asst. U. S. Attorney.

So Ordered.

/s/ WM. DENMAN,
Chief Judge.

/s/ H. T. BONE,
/s/ WM. HEALY,
U. S. Circuit Judge.

[Endorsed]: Filed December 13, 1949.

